

DATE: August 22, 1995

CASE NOS: 94-ERA-6 (FREELS I)

In the Matter of

Betty Freels,  
Complainant

v.

Lockheed Martin Energy Systems, Inc. (formerly known as Martin Marietta Energy Systems, Inc. (MMES)); Oak Ridge National Laboratory (ORNL); Martin Marietta Corporation (MMC); Martin Marietta Technologies, Inc. (MMT); Oak Ridge National Laboratory and Martin Marietta Energy Systems, Inc. Medical, Health Physics, Occurrence Reporting, Environmental Monitoring and Industrial Hygiene Departments; and Oak Ridge Operations Office,  
Respondents,

and

Case No.: 95-CAA-2 (Freels II)

In the Matter of

Betty Freels,  
Claimant,

v.

Lockheed Martin Energy Systems, Inc. (formerly known as Martin Marietta Energy Systems, Inc. (MMES)); Oak Ridge National Laboratory (ORNL); Martin Marietta Corporation (MMC); Martin Marietta Technologies, Inc. (MMT); Oak Ridge National Laboratory and Martin Marietta Energy Systems, Inc. Medical, Health Physics, Occurrence Reporting, Environmental Monitoring and Industrial Hygiene Departments; Oak Ridge Operations Office; and Department of Energy (DOE),  
Respondents,

**RECOMMENDED ORDER DISMISSING DEPARTMENT OF ENERGY  
AS A RESPONDENT AND GRANTING MOTIONS FOR SUMMARY DECISION  
IN CASE NUMBERS 94-ERA-6 AND 95-CAA-2**

**Preliminary Matters**

The complaint for case number 94-ERA-6 was filed on August 9, 1993. This complaint alleges discrimination in violation of

the whistleblower provisions of Section 210 of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851, and the implementing regulations of the Secretary of Labor at 29 C.F.R. Part 24.

On August 3, 1994, the complaint for case number 95-CAA-2 was filed under the employee protection provisions of the Clean Air Act, 42 U.S.C. § 7622 and the implementing regulations at 29 C.F.R. Part 24.

Case number 94-ERA-6 was assigned to this Administrative Law Judge, and case number 95-CAA-2 was assigned to another judge. A motion to consolidate the two cases was filed by the complainant. The two cases were reviewed, and it was concluded the cases involved the same parties (except for the addition of the U.S. Department of Energy) and that the second filing was merely an extension of the fact pattern from the first case.

Therefore, on January 4, 1995, the cases were consolidated with this Administrative Law Judge as the presiding official.

The major respondent in this case was previously known as Martin Marietta Energy Systems, Inc. This firm merged with another and since May 19, 1995, it has been known as the Lockheed Martin Energy Systems, Inc.

#### HISTORY OF THE CASE

On August 9, 1993, Ms. Freels filed a complaint under the Energy Reorganization Act with the U.S. Department of Labor Employment Standards Administration, Wage and Hour Division. On December 13, 1993, Ms. Freels was informed that her complaint had been denied. Thereafter, on December 16, 1993, an appeal was filed with the Office of Administrative Law Judges.

The complaint pertaining to case number 94-CAA-2 (Clean Air Act) was filed on August 3, 1994, and denied on September 23, 1994, by the Wage and Hour Division. On October 5, 1994, the Complainant appealed to the Office of Administrative Law Judges.

As previously stated, the two complaints were consolidated to be heard by this Administrative Law Judge.

The Complainant was hired by "Energy Systems" (MMES) on February 11, 1985. Ms. Freels was promoted on several occasions, and she became a senior environmental technician, level 60, on January 6, 1992. (See letter dated September 20, 1993, from Patricia L. McNutt, Assistant General Counsel for the Respondent, to the District Director, U.S. Department of Labor).

Paragraphs 12 and 13 of the above cited letter reflect that the Complainant missed numerous days of work between 1985 and 1992 for a multitude of medical problems. On June 1, 1992, Ms. Freels expressed concern that her health problems were related to

exposure (to radiation or toxic materials) at work. (See paragraph 24.)

Respondent's motion for summary judgment dated February 13, 1995, states in paragraph number 4:

To accommodate Ms. Freels' concerns, management relieved her from hazwaste sampling duties in June 1992, while allowing her to continue doing special projects sampling on a case-by-case basis, pending receipt of guidance from ORNL's Medical Division.

. . . .

By late October 1992, Ms. Freels was removed from all sampling activities and was transferred, with her consent, to the instrument coordinator position which involved no sampling work and no exposure to radiation or toxic materials.

. . . .

A few weeks later, she applied for a leave of absence under Energy Systems' Short Term Disability Plan (STD). Her application was granted and she was off work on STD, at full pay, from November 24, 1992 to May 5, 1993.

. . . .

5. Ms. Freels returned to work on May 5, 1993. Since then (pursuant to a decision announced at upper management meetings in December 1992 and January 1993 while she was off work on STD) Ms. Freels has not been assigned to any work involving exposure to radiation or toxic materials. In August 1993, Ms. Freels applied for STD benefits a second time.

. . . .

Again her application was granted. She was off work at full pay on STD from July 25, 1993 until February 1, 1994, at which time she went on Long Term Disability (LTD), at 60% of her full salary. Ms. Freels remains on LTD today. (February 3, 1995)

(Jurisdiction under the cited statutes)

To establish a prima facie case under the applicable employee protection provisions of the Energy Reorganization Act and the Clean Air Act, a complainant must show:

- (a) that she engaged in protected activity;
- (b) that the employer knew that the employee engaged in protected activity;
- (c) that the employer took some adverse action against the employee; and
- (d) that employee must present evidence sufficient to at least raise an inference that the protected activity was the likely reason for the adverse action.

It is clear that Lockheed Martin Energy Systems is an employer under the Acts and that the Complainant is considered to be an employee under the pertinent criteria. The parties agree that Ms. Freels engaged in protected activity and that the Employer knew that she engaged in such activity. However, (c) and (d) as listed above are in dispute in this case.

#### **Issues Raised in this Case**

1. Harassment by the Respondent regarding testimony in the case of Varnadore v. Oak Ridge National Laboratories and Lockheed Martin Energy Systems, Inc. (92-CAA-2, 92-CAA-5, and 93-CAA-1), decision of Administrative Law Judge von Brand on June 7, 1993.
2. Respondent's refusal to issue a medical profile excluding the complainant from exposure to heavy metals, hazardous chemicals, and radiation.
3. Violations of rights of confidentiality regarding medical records.
4. Violations of Respondent's duties to post notices to employees regarding protected activity.
5. Further discovery regarding E-mail.
6. Department of Energy as a respondent in this case.
7. Bar Department of Energy from using funds to allow contractors to defend against whistleblower complaints.

#### **Motion to Dismiss by the U.S. Department of Energy**

In case number 95-CAA-2, the U.S. Department of Energy was cited as a respondent. The Complainant has argued that the

Department of Energy should be restrained from funding Respondent's (such as Lockheed Martin Energy Systems, Inc.) defense of whistleblower complaints.

On April 28, 1995, the Department of Energy filed a motion to be dismissed as a party in case number 95-CAA-2. Department of Energy argued:

that this proceeding is beyond the statutory jurisdiction which Congress conferred on the United States Department of Labor because (A) for purposes of the employee protection provisions of the environmental statutes the complaint cites, the Complainant has never been employed by DOE; and (B) DOE is not an "employer" under the employee protection provisions of the Energy Reorganization Act.

It is argued that:

The complaint fails to specify how the DOE's conduct, even if done in the manner the complaint describes, was retaliatory and (thereby) discriminatory against the Complainant "with respect to her compensation, terms, conditions, or privileges of employment."

On September 23, 1994, the District Director, Wage and Hour Division, informed the Complainant that:

Our initial efforts to conciliate the matter did not result in a mutually agreeable settlement. Assuming arguendo that the Department of Energy is a joint employer of the complainant, our examination of the issues raised in the complaint led us to the following conclusions:

- The Department of Labor has no jurisdiction over the contractual relationship between the Department of Energy and its contractors;

The Department of Energy has cited the April 3, 1995, decision of the Secretary of Labor in Reid v. Martin Marietta Energy Systems, Methodist Medical Center of Oak Ridge, Tennessee Medical Management, Inc., et al, 93-CAA-4.

I find the decision in Reid to be on point, and I find that the Department of Energy cannot be considered as an employer of the Complainant. See Teles v. U.S. Department of Energy, 94-ERA-22, decision of the Secretary of Labor, (August 7, 1995).

Therefore, I find that the Department of Energy should be dismissed as a respondent in case number 95-CAA-2 (Freels II).

It is noted that the Complainant seeks to bar the Department of Energy from using funds to allow contractors to defend against whistleblower complaints. However, the record contains a letter from the Department of Energy, and the letter indicates that the Department of Energy has refrained from such a practice since 1992. Therefore, I find this issue to be moot.

### **Motion for Summary Judgement**

On February 14, 1995, the Respondents (excluding the Department of Energy) filed a motion for summary judgment in both cases.

Initially, Lockheed Martin Energy Systems argues that the statute of limitations under the Energy Reorganization Act is 180 days, and as the ERA complaint was filed on August 9, 1993, allegations of discrimination must pertain to events since early February 1993. The other Acts cited, including the Clean Air Act, have a 30 day statute of limitations.

Lockheed Martin Energy Systems notes that Ms. Freels testified in the Varnadore case in July 1992, and that she appeared before a Department of Energy panel in April 1992. However, no instance of retaliation since early 1993 has been attributed to these appearances.

In June 1992, the Complainant indicated that job duties could be affecting her health. When deposed, Ms. Freels testified "But I was never told not to do hazardous waste sampling until August (1992)." (See pages APX 149 and 387, appendix to respondent's motion for summary judgment.)

Lockheed Martin Energy Systems states that the Complainant was off work from November 24, 1992, to May 5, 1993. Again, she was on STD from July 25, 1993, to February 1, 1994, and at the later date she was placed on LTD. The respondent states that no discrimination occurred from May through July of 1993.

The complainant argues that a hostile working environment for Ms. Freels began in 1992 after her testimony in the case of Varnadore I. (The case before Judge von Brand.) The Complainant became ill due to toxic exposures as an environmental technician in 1992. A medical exclusion as to hazardous exposure was requested but was never granted.

In the summer of 1993, Mr. Murphy stated that the Complainant would no longer be working in his section. During 1993 and 1994, Lockheed Martin Energy Systems managers reviewed her medical records without her consent. In addition, Ms. Freels requests an extensive search of Lockheed Martin Energy Systems E-

mail to discover comments about her which were made by company officials. Moreover, intentional discrimination of a continuing nature requires equitable tolling of the statute of limitations.

This Administrative Law Judge must initially note that there is no indication that Ms. Freels was ever demoted, or lost income through January 1994, prior to the time when she began receiving LTD.

There has been extensive discovery in this case as indicated by numerous depositions, Respondent's interrogatories dated December 22, 1993, and Complainant's January 1994 response, Complainant's 86 interrogatories in mid 1994 and Respondent's responses, and other discovery that has occurred since the filing of the first complaint.

(E-mail search and further discovery)

Much time and many responses have been given to the Complainant's request for searches of E-mail. Each party has submitted affidavits as to procedures involved in programming software and in the length of time needed for processing the E-mail pertaining to a 13-month period.

This Administrative Law Judge has previously stated that the cost of a search of E-mail was not a major consideration. Respondent's computer expert indicated that it would take 80 days of work to design a program and run such a program. Complainant's expert has stated that such information could be processed in a much shorter period of time.

The undersigned notes that Lockheed Martin Energy Systems has argued that sufficient discovery had already been conducted as the Complainant had deposed eight employees and had received some eight thousand pages of documents.

The Complainant has not specifically identified any particular message, time frame, or individual in requesting the search of 13 months of E-mail (more than 10 million messages). In view of the extensive discovery completed to this date, the non-specificity of the request for a search of E-mail, and the time required for such a search, this request must be denied.

(Medical profile)

Ms. Freels contends that Lockheed Martin Energy Systems was discriminatory in not issuing a medical profile prohibiting exposure to hazardous chemicals, heavy metals, and radiation.

The Respondent acknowledges that the issue of the assignment of a profile to restrict exposure to toxins was raised as early as June 1992. The Respondent concedes that such a profile has never been assigned.

However, Lockheed Martin Energy Systems states that such an alleged oversight has no bearing on the Complainant's status with the firm. Reportedly, Ms. Freels has been away from "toxins" since August 1992. In addition, notations have been made in her records which would preclude any assignment to a job involving exposure to toxins.

Ms. Freels has acknowledged that she has not been exposed to these materials since the summer of 1992. As the Complainant was recovering from leg surgery when she returned to work in May 1993, her duties through July 1993 were primarily related to office work.

The undersigned does not agree that Ms. Freels has been damaged by the absence of a medical profile. She has not been exposed to toxins for two years, and there is no certainty as to future exposure.

(Confidentiality of medical records)

The Complainant has alleged improper disclosure of her medical records to Lockheed Martin Energy Systems personnel. This Administrative Law Judge is aware that the right to privacy does extend to medical records. However, an employer should have the right to review medical records in its possession where an employee is receiving disability benefits.

Lockheed Martin Energy Systems has a policy of providing no more than six months of STD, with full pay for such a period. Thereafter, LTD is assigned at a lower rate of pay, or the employee must work for several months to regain eligibility for STD.

It is conceded that the medical records that were reviewed were properly in the possession of the Respondent. The ability to assess potential jobs must be based on a worker's restrictions and the availability of work in the company. Therefore, it is reasonable to expect conferences between physicians and managers in determining restrictions and the ability to work. There is no indication that the medical records were disclosed to parties outside of Lockheed Martin Energy Systems.

This case is complicated by the numerous alleged disabilities and by the multitude of evaluating physicians. In essence, I conclude that the record does not reflect that Lockheed Martin Energy Systems acted improperly regarding the medical records.

(Harassment subsequent to testimony in a July 1992 trial)

Ms. Freels feels that she has been harassed by Lockheed Martin Energy Systems since her July 1992 testimony in the case of Varnadore I. The complaints are rather non-specific but

primarily focus on John Murphy who allegedly did not treat her well on occasion.

When Ms. Freels returned to work in May 1993, Mr. Murphy reportedly told her that he did not have a permanent position for her. However, Murphy helped her find a full-time position in another department, and the Complainant seemed to be satisfied to be working for Mr. Baxter in July 1993. (See APX 187, deposition of Complainant, submitted as part of Respondent's motion for summary decision.)

Once again, I would note that there is no record of a demotion or of a loss of pay in this case. The Complainant's depositions do not indicate dissatisfaction with her assigned job when she last worked in early August 1993.

I do not find continuing violations in this case as none of the complaints of harassment are well founded and as Ms. Freels worked for less than 90 days in 1993 with an absence from work from late November 1992 through April 1993. There is no basis for equitable tolling of the statute of this case.

(Posting of notices regarding whistleblower statutes)

In the complaint in 95-CAA-2, Ms. Freels alleged that her rights were prejudiced by inadequate posting of ERA notices in the Oak Ridge facilities.

On September 23, 1994, the District Director, U.S. Department of Labor, informed the Complainant, in part:

The alleged inadequate posting had no adverse effect on Ms. Freels as previous investigations conducted by this office revealed that she was aware of the employee protection provisions of these statutes.

It should be noted that the Complainant raised the issue of inadequate posting of ERA notices in the complaint for Freels II. By August 1994, the Complainant was clearly aware of her rights under the whistleblower statutes in view of the filing of the August 1993 complaint in Freels I.

The Complainant has argued that while notices were posted, these notices were enclosed in glass cases and did not provide explanatory information for others to file whistleblower complaints. However, this case focuses on Ms. Freels, alone, and she had adequate notice prior to the complaint in Freels II.

There is not showing that the notices were not posted as required by the statute. Therefore, there is no merit to this issue as raised by the Complainant.

### Conclusion

It is clear in these cases that the primary concern is a workers' compensation issue. Ms. Freels has been out of work since early August 1993 and since then she has been paid either STD or LTD by the Respondent.

There is no indication in this case that the Respondents would not return the Complainant to work if medical personnel approved such action. In addition, since the alleged discrimination began in 1992, there has been no showing of a demotion or of assignment to demeaning work. The Complainant has not shown that she was discharged or otherwise discriminated against with respect to her compensation, terms, conditions, or privileges of employment.

I conclude that there is no genuine issue as to a material fact in this case.

### **Recommended Order**

On the basis of the foregoing, I recommend that the Department of Energy be dismissed as a respondent and that the motions for summary decision filed by the other respondents be granted and the above-captioned complaints be dismissed with prejudice.

**SO ORDERED**

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RICHARD K. MALAMPHY  
Administrative Law Judge

RKM/dlh  
Newport News, Virginia

NOTICE: This Recommended Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and the issuance of final decisions in employee protection cases adjudicated under the regulations of 29 C.F.R. Parts 24 and 1978. See 55 Fed. Reg. 13250 (1990).